United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1388

To Be Argued By
JOSEPH I. STONE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	
Appellee,	74 Cr. 18
-v-	Southern District of New York
CIRILO FIGUEROA,	to Second Circuit
Defendant-Appellant.	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT
CIRILO FIGUEROA

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PRELIMINARY STATEMENT

The defendant-appellant, Cirilo Figueroa, appeals from a judgment of the United States District Court, Southern District of New York, convicting him (and eight co-defendants) after trial before Hon. Charles M. Metzner, United States District Judge, and a jury, of the crimes of violating Title 21, United States Code, Sections 173 and 174, and conspiracy to violate said sections, Title 18, United States Code, Section 371 (narcotics). The defendant was sentenced to eight years imprisonment to commence at the expiration of a current five-year term of imprisonment imposed on February 24, 1972, by Hon. David N. Edelstein, Chief Judge, Southern District of New York. The undersigned was appointed pursuant to the Criminal Justice Act to represent the appellant and this appointment was continued by order of this court.

STATEMENT OF FACTS

Cirilo Figueroa and twenty other persons were indicted in August, 1973, indictment number 73 Cr. 950 and charged in a seventeen count indictment with substantive and conspiracy counts concerning narcotic violations which occurred in March through June of 1970. A subsequent

indictment, 74 Cr. 18, was filed in January, 1974, concerning the same offenses, naming the same defendants and only to conform with the existing Second Circuit rules and regulations about the grand jury testimony of one defendant (not the appellant at bar).

Prior to trial, the undersigned represented both Jose Otero and Cirilo Figueroa after Judge Metzner held a hearing to ascertain whether or not there would be any possible conflict of interest. At that hearing, both defendants indicated that they would not take the stand and their defense would be in the cross examination of government witnesses and legal arguments attacking the indictment. Both Otero and Figueroa claimed double jeopardy prior to trial, said motion having been denied by Judge Metzner in an order attached to co-defendant-appellant's appendix. The defendant Otero, in a written statement to the court, indicated he did not desire to appeal.

Figueroa's claim of double jeopardy was based on his 1972 conviction before Judge Edelstein (71 Cr. 1167). That conviction charged that Figueroa sold heroin on February 19th and March 25th, 1970, and sold cocaine on March 25, 1970. The judgment of conviction in that case was affirmed by this court. Certiorari was denied. It

was Figueroa's contention that the heroin he sold, for which he was convicted in 1970, was in fact the same heroin or a portion of the same heroin which was introduced in this particular trial. Mr. Figueroa has indicated that he would like to submit certain materials on his own behalf concerning this double jeopardy claim and accordingly, I will not go further in the briefing of this argument.

The essential government case consisted of testimony from co-conspirators Miguel Rodriguez and Romero Gonzalez to the effect that from February to June, 1970, they distributed or helped distribute approximately 45 kilograms of heroin to various persons, including the defendant Figueroa. Their testimony was in conflict as to certain elements, i.e., Rodriguez once said Figueroa once bought six kilograms of heroin and Gonzalez said it was only five kilos. On one occasion, Rodriguez supposedly gave the narcotics to Rigoberto Rosell Rodriguez, a co-defendant (the indictment against Rodriguez was dismissed pursuant to Rule 29 at the conclusion of the government's case). Figueroa maintained and urged upon the court that he could not have been a buyer along with another co-conspirator if the co-conspirator and co-buyer was acquitted. These arguments were rejected.

To substantiate the testimony of Rodriguez and Gonzalez, the government put on the witness stand Manuel Noa and Roberto Arenas, who admitted that in a period of time prior to this indictment, they were the main culprits in a conspiracy involving the importation and distribution of approximately 1,000 kilograms of heroin. Both Arenas and Noa testified hoping that their sentences imposed would receive consideration from the government. The defendant Figueroa argued that he was the victim of a selective prosecution in that the government, for the first time, used 1,000 kilo wholesaler-distributor-jobbers to testify against the lower echelon buyers. The court rejected this argument.

The facts as testified by Rodriguez and Gonzalez are typical of the many pages of transcripts that must come to this court in a typical multi-defendant narcotics conspiracy case. The issue is one of credibility and accordingly, as to that aspect of the case, this brief is submitted pursuant to Anders v. California, 386 U.S. 738.

The defendant appellant will rely upon a more detailed recitation of dates and places submitted by co-defendants and co-appellants.

At the conclusion of the government's case, the defendant-appellant, along with other co-defendants, claimed that the indictment at bar showed multiple conspiracies rather than a single conspiracy, citing Kotteakos v U. S., 328 U.S. 750.

The defendant-appellant joins and adopts with full force and effect all arguments made by other co-defendants and co-appellants.

QUESTIONS PRESENTED

1. WAS THIS SELECTIVE AND UNFAIR PROSECUTION?
2. WAS THERE AN ABUSE BY THE COURT IN INTERPRETING RULES 8 AND 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE?
3. WAS IT ERROR TO ADMIT IN EVIDENCE NARCOTICS SEIZED FROM THE GOVERNMENT WITNESSES?
4. WERE THERE MULTIPLE CONSPIRACIES CONTRARY TO KOTTEAKOS v U. S. ?

POINT I

The prosecuting authorities have had an arbitrary right to prosecute any person if they believe the evidence was sufficient. The prosecuting attorney, under Berger v United States (supra) and Brady v Maryland, 373 U. S. 83, has a certain duty to be fair and impartial both to a defendant and to the society he represents. The main and most culpable perpetrator of a narcotic conspiracy is the importer. (The legislation enacted by Congress would so indicate.) The next most important perpetrator is the jobber or distributor of the narcotic drugs. In a lesser degree of importance are those who buy the narcotic drugs at wholesale; those who deliver the narcotic drugs; those who sell the narcotic drugs to smaller and smaller retailers and finally, the least culpable in a large federal conspiracy would, of course, be the individual narcotic user. The interests of society should best be served if the narcotic users' testimony would be used to implicate the retailers, the retailers to implicate the wholesaler, the wholesaler to implicate the jobber and the jobber to implicate the importer. This should be the theory wherein certain considerations are given to co-conspirators for testifying against other co-conspirators. It is contrary to logic when the prosecuting authorities arbitrarily pick out the top of the criminal hierarchy and offer them certain inducements to testify against the lesser members of the alleged criminal conspiracy. In this situation, they allowed the importer and his jobber to testify against a buyer of smaller amounts of narcotics.

Those given consideration (Noa, Arenas, Rodriguez and Gonzalez) were large scale importers and sellers. Their involvement in this case was subststantially greater and at a much higher level than was that of Figueroa. When the Government selects one defendant rather than another, it effectively denies one person (in this case Figueroa) the equal protection afforded by the Fourteenth Amendment of the United States Constitution!

POINT II

Whatever generalized prejudice existed against Figueroa in a large narcotics trial focused on Ortega as the government's case unfolded, and dramatically increased with the testimony of Noa and Arenas.

The government's case, in which Figueroa played the minor if not negligible role of a buyer focused on the central figure Ortega and his large involvement. Extensive evidence was introduced as to a continuing criminal agreement as to large importation of narcotic drugs involving many more "deals". Unmistakable references to organized crime were brought in again and again. There was offered testimony of threats and possible violence which the jury could not help but impute to "gangsters". The "defense" offered by Echevarria compounded and magnified the prejudice by then clear sense that this was a Cuban gangster trial. Repeated motions for severance and mistrial by Figueroa were denied.

Whether or not a severance should have been granted at the beginning of the trial, based only on the prejudice from trial which Figueroa exhibited up till then, it is clear that

> ".....the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear."
> (Schaffer v United States, 362 U.S. 511, 516 (1960))

Once proper joinder of counts has been found, severance is a discretionary remedy which may be employed

> "If it appears that a defendant . . . is prejudiced by a joinder . . . of defendants . . . for trial together."
> (Fed. R. Crim. Proc., Rule 14)

The general rule, absent a showing of prejudice is, ". . . that persons jointly indicted should be tried together . ..." United States v Borelli, 435 F. 2d 500, 502 (2d Cir., 1970), cert. denied, 401 U.S. 946 (1971). This is because the government should not ordinarily be put to two complete but separate trials of precisely the same issues, e.g., United States v Stracuzza, 270 F. Supp. 183, 188 (S.D.N.Y., 1970).

Where, however, substantial prejudice is alleged or shown, the balance must tip in favor ot the rights of the defendants, e.g., United States v Varelli, 407 F. 2d 735, 744-48 (7th Cir., 1969), appl after remand, 452 F. 2d 193, cert. denied, Saletko v United States, 405 U.S. 1040 (1972), Gregory v United States, 369 F. 2d 185, 189 (D.C. Cir., 1966), appl after remand, 419 F. 2d 1016,

cert. denied, 396 U.S. 865 (1969).

In determining prejudice a court may consider the unsavory character of a co-defendant, see United States v Myers, 406 F. 2d 746, 747 (4th Cir., 1969), his prior criminal record, see United States v Eaton, 485 F. 2d 102, 107 (10th Cir., 1973), unfavorable community sentiment, particularly when based on prejudicial publicity, Dennis v United States, 302 F. 2d 5 (10th Cir., 1962), the fact that a jury might have found multiple conspiracies, thus leading to a impermissible spill-over effect under Kotteakos v United States, 328 U.S. 750 (1956), e. g. United States v Varelli, supra, a substantial difference in the amount of testimony adduced as to various defendants, United States v Donaway, 447 F. 2d 940 (9th Cir., 1971) or that particular defendants

> ". . . are involved in only a small proportion of the evidence, and who are linked with only one or two of their co-defendants."
> (United States v Branker, 395 F. 2d 881, 886 (2d Cir.), cert. denied, Lacy v United States, 393 U.S. 1929 (1968))

All of these factors were present in the instant case.

Dangers always inherent in joint trials are magnified where conspiracy, that darling of prosecutors, is charged. Accordingly, normal safeguards must be more stringently applied, see United States v Borelli, 336 F. 2d 376 (2d Cir., 1969), cert. denied, 376 U.S. 960(1969).

". . . the proof supporting participation . . . in the single, overall conspiracy alleged in the indictment is tenuous and unsubstantial."
(United States v. Kelly, 349 F. 2d 720, 756 (2d Cir., 1965), cert. denied, 384 U.S. 947 (1966))

"The jury is subjected to weeks of trial dealing with dozens of incidents of criminal misconduct which do not involve these defendants in any way. As trial days go by, 'the mounting proof of the guilt of one is likely to affect another'."
(United States v Branker, supra, at p. 888)

The prejudice requirement of Rule 14 was met in excess; the court's refusal to grant a severance was reversible error.

POINT III

Narcotics evidence introduced primarily against Ortega (and the severed defense of Prada) was introduced against Figueroa who was an alleged conspirator.

The government does not need to offer narcotics into evidence and when it does so solely to back up or verify a co-conspirator's testimony, the prejudice magnifies itself.

POINT IV

There were two or more distinct and separate conspiracies in the particular indictment which added to its overall defectiveness. The Court, in addition to permitting two separate conspiracies, contrary to Kotteakos v U.S., 328 U.S. 750, gave the jury the typical "Pinkerton charge", which was prejudicial to Figueroa as he had nothing to do with the substantive counts of other

defendants, U.S. v Graniello, 365 F. 2d 990; U.S. v Eagleston, 417 F. 2d 11.

Furthermore, a co-defendant, Rosal Rodriguez, was acquitted on the same charges, leaving Figueroa the sole defendant as either an aider or abettor or an actual doer. In U.S. V Masiello, 445 F. 2d 1324, the Court affirmed the charge of conspiracy although outlining in a dictum opinion the distinctions that a trial court should draw. In U.S. v Hysohian, 448 F. 2d 343, a single defendant could not have been convicted of a conspiracy. How, then, could a single defendant be convicted of aiding and abetting another defendant who is acquitted of the actual substantive violations? The overall duel conspiracy and unfair "Pinkerton charge" deprived Figueroa of a fair trial and this Court, in the exercise of its discretion and pursuant to Rule 52, should reverse.

CONCLUSION

The evidence proved two distinct conspiracies contrary to existing law. The defendant was improperly selected in the prosecution of a "lower echelon" defendant and failed to grant severance when required.

The defendant was therefore denied a fair trial and this Court, in the interests of justice, should reverse the judgment of conviction, dismiss the indictment or in the alternative, order a new trial.

Respectfully submitted,

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